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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1037

TAI MUI, PETITIONER

v.

P. A. ESPERDY, AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE FOR THE DISTRICT OF NEW YORK

No. 1038

CHAN HING AND LAI CHO, PETITIONERS

v.

P. A. ESPERDY, AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE FOR THE DISTRICT OF NEW YORK

No. 1090

WOO CHENG HWA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners are citizens of the Republic of China in Formosa who entered the United States as alien crew-

men, overstayed their leave, were granted the privilege of voluntary departure in deportation proceedings, and were ordered deported after they failed voluntarily to depart. Each of them then applied to have his deportation order stayed or reopened on the ground that he wished to apply for relief as a refugee from a "Communist or Communist-dominated * * * area" (mainland China) under Section 203(a)(7) of the Immigration and Nationality Act, 8 U.S.C. (Supp. I) 1153 (a)(7).[1] Each was found ineligible for the relief sought; those determinations were upheld by the court below, which issued a single opinion (371 F. 2d 772) in the three cases.

Petitioners in No. 1037 and 1090 seek to be classified as refugees under Section 203(a)(7) and to have their status adjusted, without leaving this country, to that of lawful permanent residents; petitioners in No. 1038, not having been in this country for two years as required by Section 203(a)(7), seek to have processed, before they are deported, applications for classification as refugees, so that they might later more easily obtain admission to the United States as conditional entrants under that section. Each attacks the regu-

[1] Petitioners in No. 1037 and 1038 sought relief by way of an application for a stay of deportation. Petitioner in No. 1090 moved to reopen the deportation proceeding. After administrative relief was denied, petitioners in No. 1037 and 1038 commenced actions for a declaratory judgment in the United States District Court for the Southern District of New York. Unsuccessful there, they appealed to the court of appeals. Petitioner in No. 1090 filed a petition for review in the court of appeals of the Board of Immigration Appeals' decision, pursuant to Section 106a of the Immigration and Nationality Act. See note 10, *infra*. We have lodged with the Clerk of the Court the administrative file in the three cases.

lations adopted by the Attorney General pursuant to Section 203(a)(7). We answer the three petitions together, first setting forth the statutory scheme, and then discussing in more detail the two principal contentions of the petitioners.

1. The statutory provisions here involved are part of legislation enacted in 1965, 79 Stat. 911, *et seq.*, designed primarily to abolish the national origins quota system for the allocation of immigrant visas, and to substitute therefor a new system based upon preferences that accord priorities in the issuance of immigrant visas to various specified classes of aliens. See S. Rep. No. 748, 89th Cong., 1st Sess., 11; H. Rep. No. 745, 89th Cong., 1st Sess., 11–13. Section 201(a) of the Act, as amended, 8 U.S.C. (Supp. I) 1151(a), provides that "the number of aliens who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence * * * shall not in any fiscal year exceed a total of 170,000." Section 202(a) of the amended Act, 8 U.S.C. (Supp. I) 1152(a), provides, *inter alia,* that in any fiscal year no more than 20,000 natives of any single country shall be admitted, and establishes a scheme of preferences in Section 203(a)(1) through (7) of the amended Act, 8 U.S.C. (Supp. I) 1153(a) (1)–(7). In that section, the first, second, fourth and fifth preferences (amounting to seventy-four percent of the quota) are allocated to various classes of relatives of United States citizens or aliens admitted for permanent residence; third preference (ten percent of the quota) is accorded to members of the professions, or to scientists and artists who will

substantially benefit the United States; sixth preference (ten percent of the quota) is granted to alien workers, skilled or unskilled, for whose labor a shortage exists in the United States. The seventh preference (Section 203(a)(7), 8 U.S.C. (Supp. I) 1153(a)(7)), amounting to six percent of the total or 10,200 persons, is set aside for refugees; it provides:

> Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe * * * to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area * * * and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made * * * [2]
>
> *Provided:* That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

[2] In matter omitted as irrelevant here, the section goes on to provide for preferences to refugees from the Middle East and persons "uprooted by catastrophic natural calamity."

The Attorney General by regulation, 8 C.F.R. 235.9 (Appendix, *infra*, pp. 15–16) has provided that applications for conditional entry under the first part of this subsection may be made only in Austria, Belgium, France, Germany, Greece, Italy and Lebanon. By further regulation, 8 C.F.R. 245.4 (Appendix, *infra*, pp. 16–17), he has provided that the terms of Section 245 of the Act, 8 U.S.C. 1255 (Appendix, *infra*, p. 15)—the general adjustment of status provision—"shall govern the adjustment of status provided for in the proviso."

2. Petitioners in Nos. 1037 and 1090 contend that the proviso to the seventh preference section, Section 203(a)(7) of the Act (quoted above), which speaks of "adjustment of status," was not intended to incorporate the provisions of Section 245 of the Act, which deals generally with adjustment of status and which explicitly denies to alien crewmen that discretionary relief. They argue that the regulation, insofar as it interprets the statute as making Section 245 applicable to refugees under Section 203(a)(7), is invalid, and that since the latter provision alone does not bar relief to alien crewmen, they are eligible for its benefits.

The court below was correct, however, in reasoning that Congress, in passing Section 203(a)(7), did not thereby intend to benefit alien crewmen, otherwise prohibited from adjusting their status under Section 245, by providing an independent avenue for the adjustment of their status. As the court noted (371 F. 2d at 778–779), the legislative history of Section 203(a)(7) shows that Congress intended that applica-

tions for relief thereunder be made pursuant to the adjustment of status provision of Section 245. Indeed, the Senate Report states categorically that "[i]t is contemplated that such adjustments will be made under Section 245 of the Immigration and Nationality Act." S. Rep. No. 748, 89th Cong., 1st Sess., 22.[3]

Moreover, textual analysis supports the conclusion that adjustment of an alien's status upon his reclassification as a refugee under Section 203(a)(7) must be accomplished under Section 245. Section 203 purports to do no more than establish a preferential system for the allocation of immigrant visas under the world-wide quota (170,000 persons), and in the proviso to subsection (a)(7) does no more than make available to refugees a limited number of seventh

[3] Much is made of the fact that no similar statement appears in the House Report; see Pet. No. 1090, pp. 8–9. It is obvious, however, that the failure of that report (H. Rep. No. 745, 89th Cong., 1st Sess.) to contain a similar declaration does not indicate disapproval of, or disagreement with, the Senate position. We note also that Congressman Feighan, Chairman of the House Sub-committee on Immigration and Nationality and one of the chief architects of the 1965 Act, has recently indicated that it is and was his understanding that Section 203(a)(7) incorporates the provisions of Section 245 for applications of adjustment of status under the former section's proviso. In commenting this past June on the changes which the 1965 Act has made in the bill that he had originally offered, Congressman Feighan stated:

> Other provisions of my bill which were subsequently modified were * * * the eligibility for Section 245 adjustment for those who entered as crewman (the final bill barred crewman, including potential 203(a)(7) refugees, from that privilege).

The text of this speech is printed in Vol. XIX, Immigration Bar Bull., No. 1, pp. 3–4 (Jan.–June 1966), and reprinted in 112 Cong. Rec. 13958–13959 (Daily ed., June 29, 1966).

preference visas to satisfy the "visa availability" requirement for adjustment of status under Section 245; in other words, it clearly does not establish any separately available avenue of relief. Thus, while the words "adjustment of status" appear in the proviso to Section 203(a)(7), they merely convey one of the requisites of eligibility for a preferential visa under the section—a time requirement—namely, that in order to be eligible for an immigrant visa in lieu of conditional entry, a refugee already present in this country must "have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status." The proviso spells out no procedural avenue for obtaining relief, unlike every independent relief provision of the Act—*e.g.*, Section 244, 8 U.S.C. 1254 (suspension of deportation); Section 245, 8 U.S.C. 1255 (adjustment of status); Section 249, 8 U.S.C. 1259 (award of permanent resident status to certain aliens); and Section 212(e), 8 U.S.C. 1182(e) (waiver of foreign residence requirement for exchange visitors).[4] Had Congress intended the proviso to Section 203(a)(7) to be a similar independent and self-sustaining relief provision, it would have used similar

[4] Each of the cited sections reads in terms of a grant of authority to the Attorney General to provide the relief specified in his discretion. The sole exception to the statement in the text appears in Section 241(f), 8 U.S.C. 1251(f), which provides for waiver of deportation for aliens, with certain close relatives in the United States, who entered the country through a misrepresentation (see *Immigration and Naturalization Service* v. *Errico*, 385 U.S. 214). However, that section, unlike other relief provisions of the Act, is of automatic effect, once the alien comes within the defined class.

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specific language to that of those sections. Accordingly, it seems clear that Congress intended the proviso to refer to the general adjustment of status provision, Section 245.

Further support for the interpretation of the proviso to Section 203(a)(7) by the Attorney General and the court below is found in Congress' precise enactments regarding alien crewmen, the class in which all petitioners fall. In 1960 alien crewmen were excluded from adjustment of status benefits under Section 245 because of "frequent abuses of the immigration laws by deserting seamen." H. Rep. No. 2088, 86th Cong., 2d Sess., 2. This provision "codifie[d] an enforcement policy usually followed under earlier versions of this statute." Gordon and Rosenfield, *Immigration Law and Procedure* 7–59 (1966). It is hardly likely that Congress would have significantly changed the strict treatment of alien crewmen under the immigration laws without some more explicit statement in Section 203(a)(7). Moreover, as the court of appeals noted (371 F. 2d at 778), Congress in 1965 was well aware of the special problems posed by alien crewmen. At the same time that it added Section 203(a)(7), Congress amended Section 244 of the Act (8 U.S.C. (Supp. I) 1254) (which had permitted suspension of deportation for aliens other than alien crewmen under more stringent conditions than Section 245), so as to make the benefits of that section available to alien crewmen who had entered the United States prior to June 30, 1964, and had resided in this country for a specified period. See 8 U.S.C. 1254(f); Gordon and Rosenfield, *Immigra-*

tion Law and Procedure 7–91, 7–92 (1966). Congress did not at the same time amend Section 245, and it seems clear that it did not intend to do so indirectly, as to alien crewmen refugees, by the passage of Section 203(a)(7).

In summary, the language of Section 203, its place in the statutory scheme, its legislative history (albeit limited), and the clear congressional policy with respect to alien crewmen show that Section 245's adjustment of status provision is controlling, and hence that petitioners are ineligible for that discretionary relief.

3. Petitioners in Nos. 1038 and 1090 contend that they should have been permitted to process their applications for conditional entry while they are still within this country, at least to the extent of being classified as refugees for the purpose of later seeking conditional entry under Section 203(a)(7).[5] They argue that the regulation (8 C.F.R. 235.9, Appendix, *infra*, pp. 15–16) permitting the filing of such applications only in seven specified countries, implicitly excluding filing in the United States, and in the Far East, where petitioners are to be deported, is invalid. In effect they seek either to have the Attorney General ordered to process their applications before they are deportd, or to have their deportation stayed until the Attorney General should direct immigration officials in the Far East to accept Section 203(a)(7) applications.

[5] Petitioner in No. 1090 makes this contention as an alternative to the primary relief he seeks of adjustment of status (see Pet. 2, 8). Petitioner in No. 1037 apparently does not seek classification as a refugee in this country.

However, as the court of appeals noted (371 F. 2d at 779), Section 203(a)(7) accords quota preferences only to two classes of refugees—those abroad who are seeking entry into the United States (conditional entry) and those already physically in the United States for a minimum period of two years (adjustment of status). Both congressional committees reporting on the provision stated that the conditional entry procedure was not "unlike the parole procedure utilized during the existence of the so-called Fair Share Act (sec. 212(d)(5)) and it is intended that the procedure remain the same." H. Rep. No. 745, 89th Cong., 1st Sess. 15; S. Rep. No. 748, 89th Cong., 1st Sess., 16. That statute had provided for parole into the United States, pursuant to such regulations as the Attorney General prescribed, of an alien refugee-escapee who applied "for parole while physically present within the limits of any country which is not Communist, Communist-dominated, or Communist-occupied * * *" 74 Stat. 504. The statute was administered under regulations permitting applications for parole to be made only "to the officer in charge of the nearest office of the Service in Europe" and were to be approved by an "officer in charge outside the United States * * *" 8 C.F.R. 212.5(b) (1965).[6] Moreover, under the Fair Share Refugee Act, the examination of refugees who made application for parole was in practice limited to seven countries, namely,

[6] The regulation also required assurances of employment and housing in the United States for a period of two years and assurances of transportation from the applicant's place of abode to point of final destination in the United States.

Austria, Belgium, France, Germany, Greece, Italy and Lebanon, whose governments had consented, pursuant to an agreement with the Department of State, to the presence of United States immigration officers within their respective territories for the purpose of examining applicants for parole into the United States as refugees, countries that had also agreed to accepting the return within two years of any refugees found to be statutorily inadmissible to the United States. It was this procedure and arrangement to which Congress made specific reference when it enacted Section 203(a)(7), at the same time repealing the relevant sections of the Fair Share Refugee Act. See H. Rep. No. 745, at 15, *supra*, p. 10; S. Rep. No. 748, at 17, *supra* p. 10. We think it clear, therefore, that Congress contemplated that the conditional entry program under the present law would be of similar design. The regulations governing applications of refugees for conditional entry, which petitioners attack, correspond with the legislative purpose embodied in Section 203(a)(7). Indeed, they are virtually identical with the regulations adopted to govern the parole of refugees into the United States under the former act, to which Congress alluded.[7] In light

[7] Petitioners in No. 1038 and petitioner in No. 1090 contend more specifically that applications for classification as refugees may be made in the United States, notwithstanding 8 C.F.R. 235.9, because the first paragraph of Section 203(a)(7) does not explicitly provide to the contrary. The section states that the examination for conditional entry be before an Immigration official "in any non-Communist or non-Communist dominated country * * *". Petitioners' contention thus requires the strained interpretation that Congress intended to include reference to the United States in the term "any non-Communist or

of this history, the court below was clearly correct in ruling (371 F. 2d at 779–780) that 8 C.F.R. 235.9, limiting applications at this time to refugees in seven named countries, is a proper implementation of the statute.

We believe, further, that petitioners exaggerate the effect of the decision below on the scope of Section 203 (a)(7); it does not render the section nugatory.[8] Indeed, the Immigration Service advises that in the 1966 calendar year 4427 refugees abroad were granted conditional entry, and 5976 alien refugees present in this country were granted adjustment of status, a number exceeding that authorized by the statute for any fiscal year.[9]

Communist dominated country." Although the United States is of course such a country, Congress had no difficulty in using the term "United States" when referring to it. And it did so elsewhere in Section 203(a)(7). Moreover, the contention overlooks the distinction in the section between refugees abroad, for whom conditional entry is designed, and refugees present in this country for two years, to whom the proviso is addressed.

[8] We note also that the Ninth Circuit has recently interpreted Section 203(a)(7) in similar fashion, as "not creat[ing] any new procedure for adjustment of status." See *Wing Wa Lee* v. *Immigration and Naturalization Service*, C.A. 9, No. 21,960, decided March 28, 1967.

[9] Section 203(a)(7) has not been in effect for a full fiscal year; hence, the figures given are for the calendar year 1966. Since only 10,200 refugees may receive preferential status under the section in a fiscal year, it is evident, from the figures above, that more refugees than can be accommodated will apply.

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.[10]

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APRIL 1967.

[10] Petitioners in No. 1037 and 1038 also suggest that this Court should review the issue concerning the jurisdiction of the district court to entertain their action. It is true that there is some confusion concerning the route for judicial review of denial of applications for stays of deportation pending some other administrative action—*i.e.*, whether it must be by way of declaratory judgment in the district court or by way of a petition for review in the court of appeals under the provisions of Section 106a of the Act, 8 U.S.C. 1105a, for review of "final orders of deportation". Compare the instant cases with *Roumeliotis* v. *Immigration and Naturalization Service*, 304 F. 2d 453 (C.A. 7), certiorari denied, 371 U.S. 921; *Skiftos* v. *Immigration and Naturalization Service*, 332 F. 2d 203 (C.A. 7); *Malone* v. *Immigration and Naturalization Service*, 355 F. 2d 533 (C.A. 7). However, the court below found the requisite jurisdiction and proceeded to decision on the merits in all three cases. Accordingly, since the jurisdictional issue was decided favorably to petitioners, they are in no position to urge review of that issue.

APPENDIX

Statutes and Regulations Involved

Section 203(a)(7) of the Immigration and Nationality Act, as amended, 8 U.S.C. (Supp I) 1153(a)(7), 79 Stat. 913, provides:

> (7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist dominated country (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term "general area of the Middle East" means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: *Provided,* That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number,

to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

Section 245 of the Immigration and Nationality Act as amended (8 U.S.C. 1255), provides:

> (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.
>
> * * * * *

8 Code of Federal Regulations 235.9, as amended, effective March 30, 1966 (31 F.R. 5118), provides in part:

> § 235.9 Conditional entries.
>
> (a) Countries in which applications may be filed. Pursuant to agreements entered into with the governments of the countries concerned, officers of the Service are authorized to accept applications and to examine the qualifications of applicants for conditional entry under section 203(a)(7) of the Act in Austria, Belgium, France, Germany, Greece, Italy, and Lebanon. Applications for conditional entry may be filed only by aliens who are physically present within one of the designated countries.
>
> * * * * *
>
> (c) Application. A separate application for conditional entry under section 203(a)(7) of the Act shall be executed and submitted by each applicant on Form I–590 to the officer in charge

of the nearest Service office outside of the United States. Each applicant under this paragraph shall appear in person before an immigration officer and excepting a child under 14 years of age shall, prior to the adjudication of his application, be interrogated under oath concerning his eligibility for conditional entry into the United States. * * * The approval of an application by an officer in charge outside the United States authorizes the district director at a port of entry to effect the conditional entry of the applicant upon arrival at such port within 4 months after the date of the approval. * * *

8 Code of Federal Regulations 245.1(d), as amended, 31 F.R. 535–536, January 15, 1966, provides in part:

(d) Immediate relatives under section 201 (b) and preference aliens under section 203(a) (1) through 230(a)(7).

* * * An alien who claims preference status under the provisio to section 203(a)(7) of the Act is not eligible for the benefits of section 245 of the Act as provided in § 245.4, unless the district director has approved the alien's Application for Classification as a Refugee under the Provisio to Section 203(a)(7), Immigration and Nationality Act.

8 Code of Federal Regulations 245.4, as amended, 31 F.R. 536, January 15, 1966, provides:

§ 245.4 Adjustment of status under the proviso to section 203(a)(7) of the Act.

The provisions of section 245 of the Act and this part shall govern the adjustment of status provided for in the proviso to section 203(a)(7) of the Act. Processing of applications for adjustment under the proviso to section 203(a)(7) and this section shall be initiated in each district in the chronological order in which the applicants last arrived in the United States.

An alien who claims he is entitled to a preference status pursuant to the proviso to section 203(a)(7) of the Act shall execute and attach to his application for adjustment of status Form I–590A, Application for Classification as a Refugee under the Proviso to section 203(a)(7), Immigration and Nationality Act. The determination as to whether an alien is entitled to the claimed preference status shall be made by the district director; no appeal shall lie from his determination.

U.S. GOVERNMENT PRINTING OFFICE: 1967